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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
NO. 73-1 [illegible]

STATE OF FLORIDA,

Petitioner,

-vs-

KEITH IVAR ANDERSEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT L. SHEVIN
Attorney General

ENOCH J. WHITNEY
Assistant
Attorney General

The Capitol
Tallahassee, Florida
32304

COUNSEL FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM _____

NO. _____

STATE OF FLORIDA,

Petitioner,

-vs-

KEITH IVAR ANDERSEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF FLORIDA

PRELIMINARY STATEMENT

The State of Florida prays that a writ of certiorari issue to review the decision of the Florida Supreme Court entered in Andersen v. State on February 28, 1973, rehearing denied March 29, 1973.

OPINION BELOW

The opinion of the Florida Supreme Court was filed on February 28, 1973, and the state's petition for rehearing was denied on March 29, 1973. The decision of the court below is officially reported at 274 So.2d 228 (Fla. 1973). It will also be found in Appendix I. The Florida Supreme Court's order denying rehearing in the cause will be found in Appendix II.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari is invoked pursuant to 28 U.S.C., Section 1257(3).

STATEMENT OF THE CASE

Respondent, Keith Ivar Andersen, petitioner below, was charged by information with possession of marijuana, possession of cocaine, possession of LSD, and possession of narcotics paraphernalia. The charges were based upon items seized from respondent's dwelling during a search conducted pursuant to a search warrant issued upon an affidavit

of an agent of the Florida Department of Law Enforcement. Respondent filed a motion to quash search warrant and to suppress evidence, alleging that the affidavit was insufficient to support the issuance of the search warrant in question. Upon the denial of the motion in the trial court, respondent entered a plea of nolo contendere to possession of marijuana and cocaine, subject to the stipulation of the parties and expressly accepted by the court that the right to appeal from the court's order denying the motion to suppress evidence was not waived and was preserved. Thereupon, the remaining violations charged in the information were nolle prossed by petitioner, State of Florida.

After accepting the aforementioned pleas of nolo contendere, the trial court on August 20, 1971, adjudicated respondent to be guilty of possession of marijuana and possession of cocaine. Respondent was sentenced to confinement in the Florida State Prison for a period of one year for possession of cocaine, with recommendation for consideration for early parole, and to two years probation for possession of marijuana.

Notice of appeal was subsequently filed in the District Court of Appeal, First District, State of Florida, by respondent on August 20, 1971. On July 6, 1972, the First District Court of Appeal affirmed the order adjudicating guilt and sentences aforesaid, which opinion is officially reported at 265 So.2d 404. It will also be found in Appendix III.

On September 12, 1972, respondent herein, petitioner below, petitioned the Supreme Court of Florida for a writ of certiorari to review the aforesaid decision of the First District Court of Appeal. On February 28, 1973, the Florida Supreme Court granted certiorari, quashed the decision of the First District Court of Appeal, and directed that respondent herein, petitioner below, be discharged.

On March 12, 1973, petitioner herein, respondent below, petitioned the Supreme Court of Florida for a rehearing. Said petition was denied on March 29, 1973.

This petition for a writ of certiorari followed.

STATEMENT OF THE FACTS

The respondent herein, defendant in the trial court, filed in the trial court a motion to quash search warrant and to suppress evidence, alleging that:

> ". . . the evidence was obtained by the law enforcement authorities as the result of an unreasonable search and seizure in violation of the defendant's rights guaranteed to him by the Fourth and Fourteenth Amendments to the United States Constitution . . . in that:
>
> "1. Probable cause did not exist for the search of the said premises [defendant's residence].
>
> "2. Probable cause did not exist for believing the existence of the grounds on which the [search] warrant was executed.
>
> "3. The affidavit in support of the search warrant was defective because:
>
> (a) It fails to show probable cause to believe that any contraband [narcotic drug or dangerous drug] included in Chapter 398 or Chapter 404,

> Florida Statutes, was or would be in the possession of this defendant or anyone else at said premises on the date of the making of the affidavit . . ."
>
> * * *
>
> "(c) The ultimate facts of possession of contraband are based upon assumptions and conclusions of the affiant.
>
> "(d) There is no allegation in the said affidavit showing any reasonable ground to believe that the said premises contained heroin, cocaine, or any other narcotic drug or dangerous drug at the time of the making of said affidavit or the issuance of the search warrant."

In its order denying the aforesaid motion to quash search warrant and to suppress evidence, the trial court found as follows:

> ". . . [T]hat the allegations for the affidavit for search warrant reciting the information received by affiant and the circumstances surrounding it were sufficient to cause a prudent and cautious man of

> affiant's experience to believe that defendant was using his home for illicit possession and use of narcotic drugs. The affidavit establishes probable cause and the search warrant based thereon is valid."

In his appeal to the First District Court of Appeal, respondent herein, appellant in the First District Court of Appeal, assigned as error on appeal the aforesaid denial of the motion to quash search warrant and to suppress evidence. The way in which the federal question sought to be reviewed herein was passed upon by the First District Court of Appeal will be found in that Court's opinion contained in Appendix III.

In petitioning the Supreme Court of Florida for a writ of certiorari to review the aforesaid decision of the First District Court of Appeal, respondent herein, petitioner below, stated, on page 10 of said petition, as follows:

> ". . . [S]aid decision of the District Court of Appeal, First District, . . . denies to petitioner the guarantees . . . of the Fourth and Fourteenth Amendments to the Constitution of the United States of America."

The way in which said federal question sought to be reviewed herein was passed upon by the Supreme Court of Florida will be found in that Court's opinion contained in Appendix I.

The constitutional provisions which this case involves are the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. The text of said Amendments may be found on pages 63 and 64 of Volume 3 of the official Florida Statutes, 1971.

The text of the Fourth Amendment, supra, is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seizued."

The text of Section 1 of the Fourteenth Amendment, supra, is as follows:

> "All persons born or naturalized in the United States, and subject to the

> jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The actual facts of this case are limited in that the single ultimate question presented was the sufficiency of the affidavit in question to support the issuance of a search warrant for the search of defendant-respondent's dwelling. The facts, therefore, are contained in the affidavit which is set forth in full, including attachments, in Appendix IV.

QUESTION PRESENTED

WHETHER THE AFFIDAVIT IN THIS CASE, BEING BASED UPON INFORMATION OBTAINED BY LAW ENFORCEMENT OFFICERS ENGAGED IN THE DETECTION AND ARREST OF CRIMINAL ACTIVITY, IS SUFFICIENT, UNDER UNITED STATES SUPREME COURT DECISIONS CONSTRUING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, TO ESTABLISH PROBABLE CAUSE TO AUTHORIZE ISSUING A SEARCH WARRANT?

REASONS FOR GRANTING THE WRIT

The Florida Supreme Court held the affidavit for search warrant was insufficient under the principles announced in Spinelli v. U.S., 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969), and Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964). See Appendix I, page 3. In holding the affidavit to be insufficient, the Florida Supreme Court stated on page two of its opinion that:

> "[A]ffiant Bondurant obviously had no knowledge of the events described except through 'Sheridan'. . . Bondurant, in fact, never stated whether he

> was personally acquainted with Sheridan . . . . There was no showing of Sheridan's knowledge (personal or hearsay), and, if hearsay, good reason for Sheridan believing it . . . . Any conclusion of a crime to be drawn from the affidavit rests upon a hopeless pyramiding of inferences." (Appendix I, pages 3 and 4)

In so holding, the Supreme Court of Florida failed to consider the fact, shown on the face of the affidavit, that Bondurant and Sheridan were both agents of the Florida Department of Law Enforcement. Said Court also failed to consider the reasonable inferences, based on the language of the affidavit, that Agent Sheridan was relaying to Agent Bondurant official information subject to confirmation by official records of the Florida Department of Law Enforcement, that such official information contained in the affidavit was a description of events and evidence obtained in a drug seizure in Fort Pierce, Florida, pursuant to a search warrant executed by officials of the Florida Department of Law Enforcement.

In U.S. v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965), the United States Supreme Court was presented with an affidavit containing information transmitted between agents of the Internal Revenue Service of the United States. In rejecting the contention that such information might have been based upon hearsay,

or even hearsay-upon-hearsay, this Court stated as follows:

> "Upon reading the affidavit as a whole, it becomes clear that the detailed observations recounted in the affidavit cannot fairly be regarded as having been made in any significant part by persons other than full-time investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Observations of fellow officers of the government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." 13 L.Ed.2d 684, 690 (Emphasis supplied)

In Ventresca, supra, at 13 L.Ed.2d 689, 690, this Court also stated:

> "If the teachings of the court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical

requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

"Where . . . [underlying] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Jones v. United States. . . 362 U.S. at 270, 4 L.Ed.2d at 707, 78 A.L.R. 2d 233."

Petitioner respectfully submits that the opinion of the Florida Supreme Court in the case sub judice failed to take into consideration much of the teachings of Ventresca, supra; indeed, Ventresca is not mentioned at all in said opinion.

Moreover, in its opinion, the Florida Supreme Court failed to consider that the information relayed between Florida Department of Law Enfocement Agents Sheridan and Bondurant, even if it was hearsay, should be credited under the decisions of the United States Supreme Court in United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971), and Jones v. United States, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725, 78 A.L.R.2d 233 (1960), where the Court stated:

> "'Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale. . . .'" 29 L.Ed.2d 733.

The affidavit below gives rise to the reasonable inference that the information contained therein could be verified through official records of the Florida Department of Law Enforcement.

Further, in its opinion the Florida Supreme Court failed to consider that part of the information relayed between the aforesaid Florida Department of Law Enforcement Agents, and contained in the

affidavit, was an informant's declaration against interest, viz.: One of the persons arrested during the Fort Pierce drug seizure admitted to an official of the Florida Department of Law Enforcement that he had purchased drugs from respondent Keith Ivar Andersen at the Tallahassee address to which the affidavit for search warrant was directed. Under United States v. Harris, supra, at 29 L.Ed.2d 733, these admissions of crime [purchases of narcotics]

> ". . . carry their own indicia of credibility -- sufficient at least to support a finding of probable cause to search." 29 L.Ed.2d at 734.

Petitioner also feels that the opinion below of the Florida Supreme Court incorrectly rejected the inferences apparent from the face of the affidavit sub judice. In Aguilar v. Texas, supra, at 12 L.Ed.2d 726, 729, the Court held:

> "'The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often

> competitive enterprise of ferreting out crime.'" (Citing Johnson v. United States, 92 L.Ed. 436, at 440)
>
> * * *
>
> ". . . [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant' . . . and will sustain the judicial determination so long as 'there was substantial basis for [the magistrate] to conclude that narcotics were probably present. . . .'" (Citing Jones v. United States, 4 L.Ed.2d 697, at 708)

In the case at bar, the affidavit supporting the search warrant issued by the Circuit Court recites the following information concerning respondent's criminal activities conducted within respondent's residence:

> 1. That three letters written by respondent contained discussions

concerning the apparent purchase, dispensing of and trafficking in narcotic drugs by respondent and another; and

2. That these letters indicated that narcotic drugs, specifically heroin, cocaine and marijuana, were being transmitted by respondent via the United States mails; and

3. That two of said letters were attached as exhibits of said affidavit and bear dates indicating they were written and mailed within 20 days of said affidavit; and

4. That said letters were seized pursuant to the execution of a search warrant in Fort Pierce, Florida, by officials of the Florida Department of Law Enforcement; and

5. That said letters bore a return address in Tallahassee, i.e., the location of respondent's premises; and

6. That one of the persons arrested in the execution of

> the Fort Pierce, Florida, search warrant advised the arresting officer that he (the arrestee) had previously purchased drugs from respondent at the aforesaid address in Tallahassee.

Under these facts and the decisions cited above, it is apparent that the question presented by petitioner should be answered in the affirmative, and that the Florida Supreme Court incorrectly construed and applied said decisions of the United States Supreme Court in deciding a federal question of substance. Thus, petitioner submits that in the opinion below, the Florida Supreme Court decided a federal question of substance in a way probably not in accord with applicable decisions of the United States Supreme Court.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Florida Supreme Court.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

ENOCH J. WHITNEY
Assistant
Attorney General

The Capitol
Tallahassee, Florida
32304

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Petition for Writ of Certiorari have been furnished respondent's counsel, the Honorable Wilfred C. Varn and the Honorable Thomas M. Ervin, Jr., ERVIN, VARN, JACOBS & ODOM, Post Office Box 1170, Tallahassee, Florida, via U.S. Mail, this _____day of June, 1973.

ENOCH J. WHITNEY
Assistant
Attorney General

OF
COUNSEL FOR PETITIONER

APPENDICES

APPENDIX I

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1973

RECEIVED
MAR 1 1973
ATTORNEY GENERAL'S OFFICE

KEITH IVAR ANDERSEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 42,810

Opinion filed February 28, 1973

Writ of Certiorari to the District Court of Appeal, First District

Wilfred C. Varn and Thomas M. Ervin, Jr. of Ervin, Varn, Jacobs & Odom, for Petitioner

Robert L. Shevin, Attorney General and Enoch J. Whitney, Assistant Attorney General, for Respondent

PER CURIAM.

Petitioner by conflict certiorari proceedings to the First District Court of Appeal seeks review of that court's affirmance of his conviction of possession of marijuana and cocaine. (Andersen v. State, Fla. App. 1972, 265 So. 2d 404.) We have jurisdiction because of apparent conflict with our decision in State v. Smith, Fla. 1970, 233 So. 2d 396.[1]

At the trial level petitioner sought to quash a search warrant and to suppress the evidence seized from his apartment,

---

1. Fla. Const., Art. V, §4(2), 1968, now Fla. Const., Art. V, §3(b)(3), 1971.

by attacking the sufficiency and validity of the affidavit supporting the search warrant. The trial judge was not impressed and denied the motion. Reserving his objections, petitioner pleaded nolo contendere,[2] whereupon, the trial judge found him guilty and entered judgment and sentence thereon.

The District Court of Appeal was equally unimpressed with petitioner's continued asserted errors. Now, the case appears before us on comparatively simple facts and application of law.[3]

The record proper discloses that the affidavit in question was executed by a Tallahassee special law enforcement agent, Bondurant, who obviously had no personal knowledge of the events contained in his affidavit. Bondurant related that a special law enforcement agent, Sheridan, of Orlando (some 240 miles from Tallahassee) told him that one week prior thereto a search conducted in Ft. Pierce (some 115 miles from Orlando) revealed drugs and certain letters from the petitioner implicating him in drug traffic. Attached to Bondurant's affidavit were several (reproduced in typed form) copies of alleged letters from petitioner. Bondurant never related whether Sheridan's information was to his personal knowledge or whether, if hearsay, that Sheridan had reason to believe it. In fact, Bondurant never indicated that he knew or was personally acquainted with Sheridan. Bondurant stated he was then "advised" by certain "officials" of the Tallahassee Post Office Department that the department was in possession of a letter addressed to petitioner which appeared to contain some bulky substance other than paper. However, Bondurant never named the postal "officials" talked to, whether their observations were personal, or hearsay through other postal employees, and, if so, that they had good reason to believe it.

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2. State v. Ashby, Fla. 1971, 245 So. 2d 225; Chesebrough v. State, Fla. 1971, 255 So. 2d 675, cert. den. 406 U.S. 976, 32 L.Ed.2d 676.

3. Foley v. Weaver Drugs, Fla. 1965, 177 So. 2d 221.

Thus, the stage is set for a legal determination of the sufficiency of the affidavit to support the search warrant and resultant seizure, the conclusion of which determines petitioner's ultimate guilt or discharge in this case.

We are clearly aware of the deference that is to be paid by reviewing courts in determining probable cause for issuance of search warrants;[4] the credibility of sources of information;[5] and that search warrants may properly be issued upon hearsay statements subject to the standards of the probable cause test.[6] However, other criteria also exist.

In State v. Smith, supra, our court discussed at length affidavits and search warrants and we adopted the rationale of Spinelli v. U. S., 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 637 (1969), which in turn elaborated upon Aquilar, supra. The District Court even quoted in part from Justice White's concurrence in Spinelli which succinctly stated Aquilar's principle to be:

> "If the affidavit rests on hearsay - an informant's report - what is necessary under Aguilar is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it." (Emphasis supplied)[7]

Applying the foregoing principles to the affidavit sub judice, its tensile strength is stretched beyond endurance: affiant Bondurant obviously had no knowledge of the events described except through "Sheridan" and certain "officials" of the post office department; Bondurant, in fact, never stated whether he was personally acquainted with Sheridan or the postal "officials"; there was no

---

4. State v. Smith, supra.

5. McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967)

6. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

7. See Reed v.State, Fla. 1972, 267 So. 2d 70.

showing of Sheridan's knowledge (personal or hearsay, and, if hearsay, good reason for Sheridan believing it); and there was no showing of the postal "officials" knowledge to be personal or hearsay through other employees, and, if hearsay, their good reason for believing it. Any conclusion of a crime to be drawn from the affidavit rests upon a hopeless pyramiding of inferences. Agent Bondurant may "in his opinion" have had good reason for "his" belief that a search warrant should be issued, but that is not the legal test to be applied where his conclusion is based on hearsay. The affidavit of 3 typewritten pages, containing numerous handwritten corrections, was obviously no sudden ebullition, and could have easily contained the factors we have commented on, if known and if true.

Law is and should be profound, and our conclusion is not to be construed as an avalanche of vituperation. In this case only, and upon these given facts, the affidavit falls short of being sufficient.

Accordingly, for the reasons stated, certiorari is granted and the decision of the First District Court of Appeal is quashed and this cause is remanded to the First District Court of Appeal with instructions that petitioner be discharged.

It is so ordered.

CARLTON, C.J., ROBERTS, AIKINS and McCAIN, JJ., Concur

DEKLE, J., Dissents

APPENDIX II

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1973

THURSDAY, MARCH 29, 1973

DOCKETED

4-2-73

BUREAU ATTORNEY GENERAL

KEITH IVAR ANDERSEN,

Petitioner,

vs. ** CASE NO. 42,810

STATE OF FLORIDA, **

Respondent. **

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ATTORNEY GENERAL'S OFFICE

On consideration of the petition for rehearing filed by attorney for respondent and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ADKINS and McCAIN, JJ., concur

DEKLE, J., dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

Y

CC: Hon. Enoch J. Whitney
Ervin, Varn, Jacobs & Odom
(Hon. Wilfred C. Varn,
Hon. Thomas M. Ervin, Jr.)
Hon. Raymond E. Rhodes, Clerk

(THE MANDATE HAS BEEN ISSUED AND MAILED TO THE CLERK OF THE FIRST DISTRICT COURT OF APPEAL.)

APPENDIX III

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1972

KEITH IVAR ANDERSEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE PETITION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DOCKETED 7-6-72 FLORIDA ATTORNEY GENERAL

CASE NO. P-494

RECEIVED JUL 6 1972 ATTORNEY GENERALS OFFICE

Opinion filed July 6, 1972.

An Appeal from the Circuit Court for Leon County. Guyte P. McCord, Jr., Judge.

Thomas M. Ervin, Jr., and Wilfred C. Varn, of Ervin, Varn, Jacobs & Odom, for Appellant.

Robert L. Shevin, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, for Appellee.

CARROLL, DONALD, J.

The appellant was charged with and convicted of the crimes of possession of marijuana and possession of cocaine and has appealed from his judgment of conviction and sentence entered by the Circuit Court for Leon County, and from an order of the court denying the appellant's motion to quash a search warrant and to suppress evidence seized under such warrant.

The sole question presented for our determination in this appeal is whether the trial court's said order denying the appellant's motion to suppress items seized from his private dwelling denied to the appellant the right against unreasonable searches as guaranteed by the fourth and fourteenth amendments to the United States Constitution, Article I, Section 12, of the Florida Constitution, and the laws of Florida.

The search warrant in question was issued by the court upon the basis of an affidavit executed by one Terry Bondurant, a Special Agent of the Florida Department of Law Enforcement. In that affidavit Bondurant stated that narcotic drugs are being kept on the premises of the appellant's residence in Tallahassee; that the affiant was advised by Special Agent Robert Sheridan of the Orlando office of the Florida Department of Law Enforcement concerning such violation of the laws of Florida within a week before the filing of the said affidavit, that special agents of the said Orlando office had executed a search warrant in St. Lucie County and, pursuant thereto, seized three letters addressed to the occupant of the premises and sent by the appellant, the contents of which letters centered around discussions of the purchase, dispensing, and trafficking of narcotic drugs, the letters indicating that the said drugs were being transmitted between these parties via the U.S. mails. Copies of two of the three seized letters from the appellant to the said occupant in St. Lucie County were attached to the affidavit, the two letters indicating that both the appellant and the said occupant were engaged in the illicit drug traffic. Finally, the affiant declares in his affidavit: "On the basis of your affiant's experience and from the facts set forth herein, your affiant therefore believes and has good reason to believe that the premises and curtilage described herein to be searched, and is heretofore more particularly described, are being used to violate the laws of the State of Florida prohibiting the possession of heroin and cocaine."

Upon the basis of the foregoing affidavit, the trial court found that probable cause existed to believe that the law is being violated, and issued the search warrant.

As stated by the appellee in its brief, the issue in search warrant proceedings is not guilt beyond a reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed 2d 723 (1971). This court

held in Harrington v. State, 110 So.2d 495 (Fla. App. 1959):

> "The test is not whether the affiant should or should not rely on the information provided by the informer, but simply whether he did rely upon it and whether the circumstances stated by the affidavit are reasonably sufficient to warrant the conclusion that it is likely the law is being violated,...."

In Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed2d 637 (1969), the U. S. Supreme Court held that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause" for the issuance of a search warrant.

The appellant contends, and we must agree, that Bondurant's above affidavit is based largely upon hearsay evidence. That fact, however, does not render the affidavit useless as a basis for the issuance of a search warrant, under the established decisional law of this jurisdiction and the United States Supreme Court. For instance, the latter court said in Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L.Ed2d 697 (1960) that "hearsay evidence may provide the probable cause necessary for the issuance of a search warrant where a substantial basis for crediting the hearsay evidence is presented."

More specifically, with reference to a confidential tip, the U.S. Supreme Court held in Spinelli v. United States, supra:

> "--what is necessary under Aguilar is one of two things: the informant must declare either (1) that he has himself seen or preceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it." White, J., Concuring

In State v. Smith, 233 So.2d 396 (Fla. 1970) the Supreme Court of Florida held that an affidavit for a search warrant "which is otherwise sufficient is not tainted by reference to a confidential tip, even though that tip is inadequate itself under the Aguilar and Spinelli cases." Our Supreme Court then quoted with approval the following from the Spinelli case, supra:

> "[W]e do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause

> * * *; that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial * * *; that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense * * *; and that their determination of probable cause should be paid great deference by reviewing courts * * *."

One of the Florida cases involving a factual situation most nearly analogous to that in the case at bar is Ludwig v. State, 215 So.2d 898 (Fla. App. 1968), in which the Third District Court of Appeal held that "a valid search warrant may be issued even though the affidavit upon which it is based does not include an allegation that the affiant has received his information from a reliable source."

Finally, the Supreme Court of Florida held in Chacon v. State, 102 So.2d 578 (Fla. 1957):

> "In other words, an officer may obtain information which would be adequate to support probable cause for the issuance of a search warrant even though if such information were subjected to the technical rules of evidence applicable to the trial of the cause, it would not be considered admissible."

The appellant has also made several other contentions in this appeal, each of which is directed to a particular segment of the Bondurant affidavit. For instance, the appellant claims that a portion of the affidavit is insufficient, which portion states that there is a letter in the Tallahassee post office addressed to the appellant appearing to contain "some bulky substance other than paper." Certainly, if that statement were the only statement in the affidavit, the affidavit would be insufficient to justify the issuance of the search warrant, but there were numerous other statements in the affidavit that we think amply justified the court's finding that the affiant had a reasonable ground for believing that contraband drugs were on the appellant's premises. In fact, the statement about the letter in the post office may be treated as surplusage.

Upon the authority of the foregoing decisions, the judgment and order appealed from herein should be and they are

Affirmed.

SPECTOR, Chief Judge, and RAWLS, J., CONCUR.

APPENDIX IV

FILED IN THE CIRCUIT COURT STATE OF FLORIDA IN AND FOR LEON COUNTY

AFFIDAVIT FOR SEARCH WARRANT

FILED BEFORE ME IN CHAMBERS AT Tallahassee THIS 5th DAY OF February A.D. 71

Ben C. Willis
Circuit Judge

STATE OF FLORIDA

COUNTY OF LEON

Before me, Ben C. Willis, Judge of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, personally appeared Terry Bondurant, Special Agent, Florida Department of Law Enforcement, who being by me first duly sworn, deposes and says:

Your affiant is a special agent with the Florida Department of Law Enforcement, Tallahassee, Florida, and has been assigned the investigation of numerous narcotic and dangerous drug law violations in Tallahassee, Leon County, Florida.

That he believes and has good reason to believe that the laws of the State of Florida prohibiting the possession of narcotics are being violated in and on a certain building and the curtilage thereof, to-wit:

A one story white duplex, asbestos tile building located at 310 East Palmer Avenue, Tallahassee, Leon County, Florida, with the numbers 310 appearing near the door on the western end of the building designating that unit as 310 East Palmer Avenue. Said premises being the residence of a white male believed to be Keith Anderson, and other persons to your affiant unknown.

The reasons for your affiant's belief that the laws of the State of Florida prohibiting the possession of narcotics are being violated in and on said building and curtilage thereof, and that located within such premises and on the curtilage thereof are being kept certain narcotic drugs, to-wit: heroin and cocaine, are as follows: Your affiant was advised by Special Agent Robert Hamilton of the Orlando office of the Florida Department of Law Enforcement that within one week preceeding the filing of this affidavit, a search warrant was issued for certain premises located in Fort Pierce, St. Lucie County, Florida, more particularly described as 2105 Indian River Drive; said premises being the residence of Rouy Hanna, that said search warrant was served and executed by agents of the Florida Department of Law Enforcement - Orlando office; and a search conducted pursuant thereto, that in addition to various narcotic drugs

which were seized pursuant to said search, three letters addressed to the occupant of said premises were also found, the contents of two of which are attached hereto. These letters were, based upon the return address and senders name on the envelope, written and sent by Keith Anderson and bearing a return address of 310 East Palmer Avenue, Tallahassee, Florida; the contents of these letters centered around discussions between Hanna and Anderson concerning the apparent purchase, dispensing and trafficking of narcotic drugs; more specifically heroin, cocaine and marijuana; that these letters further indicated that narcotic drugs were being transmitted between these parties via the U.S. mails; and that both subjects were apparently acquiring narcotic drugs for each other; that in the letter bearing the latest date, the subject Anderson indicated for subject Hanna to send the heroin as soon as possible.

Your affiant has been advised by officials at the Post Office Department, Tallahassee, Florida, that at this time there is a letter in their possession from Fort Pierce to the subject Anderson and that although the letter is at this time sealed, it appears to contain some bulky substance other than paper. Your affiant is further advised that this letter will be delivered to said premises at approximately 9:30 A.M. tomorrow morning, February 6, 1971.

Your affiant is further advised by said Special Agent Blanden that upon the execution, subsequent search and seizure of narcotics in the premises at the Fort Pierce address, one of the persons located therein and who was arrested at that time advised the arresting officer that he had at some time previously purchased drugs from said Keith Anderson at his aforesaid Tallahassee residence.

On the basis of your affiant's experience and from the facts set forth herein, your affiant therefore believes and has good reason to believe that the premises and curtilage described herein to be searched, as is heretofore more particularly described, are being used to violate the laws of the State of Florida prohibiting the possession of heroin and cocaine.

WHEREOF, AFFIANT MAKES this affidavit and prays the issuance of a search warrant in due form of law for the search of the above described dwelling house and the said Keith Anderson and any other person or persons found therein for the said

property, heretofore described, and for the seizure and safekeeping thereof, subject to the order of this Honorable Court, by the duly constituted officers of the law.

Terry Bondurant
Terry Bondurant
Florida Department of Law Enforcement

Sworn to and subscribed before me this 5th day of February, A.D., 1971.

Ben C. Willis
Judge of the Circuit Court in and for Leon County, Florida.

The above application for search warrant coming on to be heard and having examined the applicant under oath and the above sworn affidavit set forth and the facts alleged therein and thereupon being satisfied that there is probable cause to believe that the grounds set forth in said application and the facts alleged do exist and that the law is being violated as alleged, I so find and a search warrant is hereby allowed and issued.

This the 5th day of February, A.D., 1971.

Ben C. Willis
Judge of the Circuit Court in and for Leon County, Florida

~~BIS~~ 522-18-0002

0003 0205 1155 ORLAB
AM. FDLEO,ORLAB.
ATTN LOUISE
THE FOLLOWING LETTER IS DATED FOR JAN. 20, 1971.....

RORY;

DO NOT DESPAIR. I STILL HAVE YOUR BREAD BUT ITS HARD TO SCORE A GRAM OF COKE AT THE MOMENT. THERES ONLY DIMES AROUND, BUT A COUPLE OF PEOPLE ARE GETTING SOME MORE. I@LL SEND THE SHIT OR THE MONEYBACK BY SATURDAY UNLESS YOU WANT ME TO KEEP THE BREAD UNTIL SOME COMES AROUND.

THERES A LOT OF GOOD SMOKE AROUND. I DONT HAVE A WHOLE LOT OF TIME TO GET STONED BECAUSE I HAVE A LOT OF WORK TO DO FOR CLASS.

LET ME KNOW WHATS HAPPENING. WHEN YOU GET SOME JUNK - LET ME KNOW OR SEND SOME BECAUSE I CAN GET RID OF AS MUCH AS YOU SEND IN A SHORT TIME.

KEITH

AUTH S/A SHERIDAN FDLE ORLANDO
OPR IVEY 2-5-71 1156 EST

0001 0205 1211 ORLAB
AM. FDLEO,ORLAB.
ATTN LOUISE
THE FOLLOWING LETTER IS DATED FOR JAN. 22, 1971.....

RORY,

AM REALLY SORRY TO HOLD TO HOLD THINGS UP, BUT I@M WAITING FOR SOME GOOD COKE TO COME IN. HERES A LITTLE TO LET YOU KNOW THERE IS SOME HERE. THE SHIT THATS COMING IS BETTER.

KEITH

AUTH S/A SHERIDAN FDLE ORLNADO
OPR IVEY 2-5-71 1212 EST

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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 2 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM _____

STATE OF FLORIDA, :

Petitioner, :

v. : NO. 73-1

KEITH IVAR ANDERSEN, :

Respondent. :

_____ :

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

WILFRED C. VARN

and

THOMAS M. ERVIN, JR.
of the law firm of
Ervin, Varn, Jacobs & Odom
Post Office Box 1170
Tallahassee, Florida 32302

Attorneys for Respondent,
KEITH IVAR ANDERSEN

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM ____

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	No. 73-1
KEITH IVAR ANDERSEN,	:	
Respondent.	:	
	:	

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PRELIMINARY STATEMENT

Petitioner, the State of Florida, seeks in these proceedings to review a decision of the Supreme Court of Florida officially reported at 274 So.2d 228 (Fla. 1973). This brief is submitted by respondent in opposition to said Petition for a Writ of Certiorari to the Supreme Court of Florida, as permitted by Rule 24, Supreme Court Rules.

Respondent respectfully urges, for the reasons set forth below, that this cause is not a proper one for review by this Court; that jurisdiction of this cause is not demonstrated under 28 U.S.C., Section 1257(3); that this

cause does not present the reasons and considerations for review set forth by Rule 19, Supreme Court Rules; and that certiorari should be denied.

Petitioner, the State of Florida, shall hereinafter be referred to as "Florida".

STATEMENT OF THE CASE AND FACTS

Respondent respectfully submits that the Statement of the Facts set forth in the Petition for a Writ of Certiorari to the Supreme Court of Florida is less than complete and by its omissions is misleading. This statement is for the purpose of correcting said omissions.

Florida, at page 7 of its aforementioned petition, has quoted from the petition of respondent before the Supreme Court of Florida that the constitutional provisions which this case involves are the Fourth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

In so doing, Florida has omitted significant portions of the petition of respondent before the Supreme Court of Florida.

In petitioning the Supreme Court of Florida for a writ of certiorari to review the decision of the First District Court of Appeal, respondent stated on page 10 of said petition as follows:

> . . . said decision of the District Court of Appeal, First District, is not only erroneous in said points of conflict, but as to each such point also denies to Petitioner the guarantees of Article 1, Section 12, of

> the Florida Constitution, and of the Fourth and Fourteenth Amendments to the Constitution of the United States of America. (Emphasis supplied.)

In the Petition for a Writ of Certiorari to the Supreme Court of Florida now before this Court Florida omitted the emphasized passage set forth above. Article 1, Section 12 of the Florida Constitution, referred to above, provides:

> §12. Searches and seizures
> The right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

This case, therefore involves Article 1, Section 12 of the Florida Constitution, and the guarantees set forth therein, the same being before the Supreme Court of Florida.

In the Statement of the Facts of that Petition for a Writ of Certiorari to the Supreme Court of Florida, Florida has further overlooked and omitted to advise this Court that in such certiorari proceedings before the Supreme Court of Florida, once jurisdiction is accepted the assertions of grounds of error are set forth

as points of Petitioner's Brief on the Merits. Such is the system governing such proceedings under Rule 4.5c(6), Florida Appellate Rules.

The points of error presented to the Supreme Court of Florida in this case by Petitioner's Brief on the Merits were as follows:

POINT ONE

THE AFFIDAVIT IN THIS CASE, BEING BASED UPON MULTIPLE HEARSAY AND FAILING TO ALLEGE THE SOURCE OF THE NONCONFIDENTIAL INFORMANT'S ALLEGED INFORMATION, IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE OR TO MEET THE REQUIREMENTS OF ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION; THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; OR SECTION 933.18, FLORIDA STATUTES.

POINT TWO

THE ALLEGATIONS IN THE AFFIDAVIT OF A PACKAGE AT THE POST OFFICE AND OF A PRIOR DRUG PURCHASE WERE TOTALLY INSUFFICIENT TO SUPPORT ISSUANCE OF A SEARCH WARRANT FOR A PRIVATE DWELLING UNDER THE COMMANDS OF ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION; THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; AND SECTION 933.18, FLORIDA STATUTES.

POINT THREE

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN UPHOLDING THE SEARCH WARRANT FOR DEFENDANT'S PRIVATE DWELLING, ACCORDED SAID WARRANT A DEFERENCE OR PRESUMPTION OF REGULARITY WHICH IS PROHIBITED BY ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION; SECTION 933.18, FLORIDA STATUTES; AND PRIOR DECISION OF THE FLORIDA SUPREME COURT.

Said points, serving the purpose of assignments of error, establish that in addition to Article 1, Section 12, of the Florida Constitution, there was also before the Supreme Court of Florida the command of Section 933.18, Florida Statutes 1971, providing that:

> 933.18 When warrant may be issued for search of private dwelling.--No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:
> (1) It is being used for the unlawful sale, possession, or manufacture of intoxicating liquor;
> (2) Stolen or embezzled property is contained therein;
> (3) It is being used to carry on gambling;
> (4) It is being used to perpetrate frauds and swindles;
> (5) The law relating to narcotics or drug abuse is being violated therein;
> (6) A weapon, instrumentality, or means by which a felony has been committed is contained therein; or
> (7) Unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding or lodging house.
> The term 'private dwelling' shall be construed to include the room or rooms used and occupied, not transiently but solely as a residence, in an apartment house, hotel, boarding-house, or lodging house. No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some creditable witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.

Respondent respectfully submits that, only when including consideration of the above-quoted provisions of Article 1, Section 12 of the Florida Constitution and Section 933.18, Florida Statutes 1971, is the statement of facts and the case in this cause complete.

ARGUMENT

POINT ONE

THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA FAILS TO ESTABLISH THAT THE SUPREME COURT OF FLORIDA HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE, THERE BEING BEFORE THE SUPREME COURT OF FLORIDA ADEQUATE AND APPLICABLE NON-FEDERAL STATE GROUNDS ON WHICH TO DETERMINE AND BASE SAID DECISION.

In this case the Attorney General of the State of Florida seeks to have this Court review and overturn a decision of the Supreme Court of Florida, wherein the Supreme Court of Florida held that certain evidence in a criminal case should be suppressed for the reason that the search warrant whereby such items were seized was not supported by sufficient affidavit.

In those proceedings before the Supreme Court of Florida, and at all earlier levels, respondent urged that said affidavit was insufficient to meet the commands of Article I, Section 12, of the Florida Constitution; was insufficient to meet the commands of the Fourth and Fourteenth Amendments to the Constitution of the United States; and was insufficient to meet the commands of Section 933.18, Florida Statutes 1971, which specifically governs search warrants for the invasion of private dwellings in Florida and provides in pertinent part:

933.18 When warrant may be issued for search of private dwelling.--No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:

* * *

(5) The law relating to narcotics or drug abuse is being violated therein;

* * *

. . . No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some creditable witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.

The Florida Supreme Court described the affidavit in question as follows:

> The record proper discloses that the affidavit in question was executed by a Tallahassee special law enforcement agent, Bondurant, who obviously had no personal knowledge of the events contained in his affidavit. Bondurant related that a special law enforcement agent, Sheridan, of Orlando (some 240 miles from Tallahassee) told him that one week prior thereto a search conducted in Ft. Pierce (some 115 miles from Orlando) revealed drugs and certain letters from the petitioner implicating him in drug traffic. Attached to Bondurant's affidavit were several (reproduced in typed form) copies of alleged letters from petitioner. Bondurant never related whether Sheridan's information was to his personal knowledge or whether, if hearsay, that Sheridan had reason to believe it. In fact, Bondurant never indicated that he knew or was personally acquainted with Sheridan. Bondurant stated he was then 'advised' by certain 'officials' of the Tallahassee Post Office Department that the department was in possession of a letter addressed to petitioner which appeared to contain

some bulky substance other than paper. However, Bondurant never named the postal 'officials' talked to, whether their observations were personal, or hearsay through other postal employee, and, if so, that they had good reason to believe it.

Thus, the stage is set for a legal determination of the sufficiency of the affidavit to support the search warrant and resultant seizure, the conclusion of which determine petitioner's ultimate guilt or discharge in this case.

The Supreme Court of Florida thereafter held as to said affidavit that:

> Applying the foregoing principles to the affidavit sub judice, its tensile strength is stretched beyond endurance: affiant Bondurant obviously had no knowledge of the events described except through 'Sheridan' and certain 'officials' of the post office department; Bondurant, in fact, never stated whether he was personally acquainted with Sheridan or the postal 'officials'; there was no showing of Sheridan's knowledge (personal or hearsay, and, if hearsay, good reason for Sheridan believing it); and there was no showing of the postal 'officials' knowledge to be personal or hearsay through other employees, and, if hearsay, their good reason for believing it. Any conclusion of a crime to be drawn from the affidavit rests upon a hopeless pyramiding of inferences. Agent Bondurant may 'in his opinion' had had good reason for 'his' belief that a search warrant should be issued, but that is not the legal test to be applied where his conclusion is based on hearsay. The affidavit of 3 typewritten pages, containing numerous handwritten corrections, was obviously no sudden ebullition, and could have easily contained the factors we have commented on, if known and if true.
>
> Law is and should be profound, and our conclusion is not to be construed as an avalanche of vituperation. In this case only, and upon these given facts, the affidavit falls short of being sufficient.

The Supreme Court of Florida, in holding the said affidavit insufficient, cited both state and federal prior

decisions, but did not expressly state whether its holding of insufficiency was grounded upon violation of the Constitution of the United States of America, of Article I, Section 12, of the Florida Constitution, or of Section 933.18, Florida Statutes 1971.

Each of the latter two state grounds was before the Florida Supreme Court as a basis for its decision. Each of said state grounds was urged by respondent herein as compelling the holding of insufficiency.

In this regard it is pertinent that by its plain terms Article I, Section 12, varies from the Fourth Amendment to the Constitution of the United States; provides broader specific protections than said Fourth Amendment; and expressly incorporates the exclusionary rule as a command of the Florida Constitution. In Tollett v. State, 272 So.2d 491 (Fla. 1973), the Florida Supreme Court held that Article I, Section 12, of the Florida Constitution provided broader protection from searches and seizures, in some instances, than the Fourth Amendment to the United States Constitution.

In this regard it is of even greater significance that Section 933.18, Florida Statutes, governing search warrants for private dwellings in Florida, imposes restrictions on the issuance of such search warrants even in excess of the guarantees of the Florida Constitution and the Constitution of the United States.

Section 933.18, Florida Statutes 1971, for example, enumerates in seven specific instances one of which must be shown in order for a search warrant to issue for a private dwelling. Even though other non-enumerated grounds might satisfy the minimum requirements of the Fourth Amendment to the United States Constitution, an affidavit setting forth only such non-enumerated ground would nevertheless be insufficient for the issuance of a search warrant for a private dwelling by the express terms of Section 933.18, Florida Statutes 1971.

Further, as to Section 933.18, Florida Statutes 1971, the law of Florida, in contrast to federal cases, is that the affidavit for a warrant to search a private dwelling must show probable cause on the face thereof and the State is not permitted to support the affidavit with additional evidence.

In Panzavecchia v. State, 201 So.2d 762 (3d D.C.A. Fla. 1967), as to the requirements of Section 933.18, Florida Statutes 1971, regarding search warrants for private dwellings the Court held at page 763 that:

> §933.06 and §933.18, Fla.Stat., F.S.A., were originally enacted at the same Session of the Legislature. §933.06, Fla. Stat., F.S.A., relates generally to search warrants, and §933.18, Fla.Stat., F.S.A., relates specifically to the search of a dwelling house. There is no dispute on this record that the premises searched was a dwelling house and the residence of the appellant. We hold that an affidavit in support of a search warrant for a dwelling house

> must show probable cause of the face thereof and that the State is not permitted to support the affidavit with additional evidence, as permitted by §933.06, Fla.Stat., F.S.A. It is reasonable to assume that the Legislature intended, when it enacted the original statutes [which were the forerunners of the present sections] to require a more strict procedure for obtaining the search of a dwelling house than the procedure to be available for general searches. . . . It is apparent that the Legislature was not content to rely on this general proposition as, in §933.18, Fla.Stat., F.S.A., it specifically provided: 'No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling * * *' unless based upon an affidavit in accordance with this section. (Emphasis supplied)

Respondent respectfully submits that where Article I, Section 12 of the Florida Constitution and Section 933.18, Florida Statutes 1971, were both properly before the Supreme Court of Florida and where each provides more stringent mandatory requirements for the issuance of a warrant for the search of a private dwelling than does the Fourth Amendment to the Constitution of the United States, said decision is not properly before this Court.

There was before the Florida Supreme Court adequate and independent non-federal ground upon which the holding of insufficiency may have been and, in light of more stringent requirements, most probably was based. In this regard it is pertinent that the Florida Supreme Court had before a state

warrant in a state criminal case urged to be invalid under state law and the state constitution, as well as the federal constitution. There is presented to this Court no violation of federal constitutional right, and no determination of a federal question on federal grounds.

In this regard, respondent notes that though the Florida Supreme Court stated that the rationale of Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584, 21 L Ed.2d 637 (1969) had been "adopted" by the Supreme Court of Florida, that language does not establish that the decision of the Florida Supreme Court was based on federal rather than state grounds. Indeed, the phrase ". . . adopted the rationale of . . ." indicates to the contrary for in construing and applying a federal right the Florida Supreme Court would not adopt but would be controlled by this Court's prior holding, whereas in construing and applying an independent but broader state right the Florida Supreme Court would be free to adopt and follow this Court's rationale regarding the similar federal right.

Respondent respectfully submits that the prior decisions of this Court establish that this case is not a proper one for review by this Court, and that jurisdiction of this case is not vested in this Court.

In Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194, 85 S. Ct. 871, 13 L. Ed.2d 753 (1965), this Court stated at 380 U.S. 196 that:

> . . . After plenary briefing and argument, however, we are unable to say with requisite assurance that this Court has jurisdiction in the premises.
>
> The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the equivalent provisions of the California Constitution, or both. While we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground. This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented and the party seeking review here must show that we have jurisdiction of the case.

In Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 85 S.Ct. 493, 13 L. Ed.2d 439 (1965), this Court held that its writ of certiorari had been improvidently granted and would be dismissed, stating in pertinent part at 379 U.S. 491 that:

> The discussion of the second question--whether the ordinance effects a proscribed taking, as opposed to a reasonable regulation under the police power--similarly interlaces Indiana and federal decisions, as well as decisions of other state courts.

> Again there is no intimation that the conclusion that the ordinance entails 'an unlawful and unconstitutional appropriation of property rights without payment of compensation,' 244 Ind, 193 NE2d, at 242, is based less forcefully on the Indiana Constitution than on the Fourteenth Amendment.
>
> [3] In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent
>
> *[379 US 492]
>
> and adequate *ground of decision depriving this Court of jurisdiction to review the state judgment. New York City v Central Savings Bank, 306 US 661, 83 L ed 1058, 59 S Ct 790, explained in Minnesota v. National Tea Co., 309 US 551, 556-557, 84 L ed 920, 923, 60 S Ct 676; Lynch v New York ex rel. Pierson, 293 US 52, 79 L ed 191, 55 S Ct 16.

In State of California v. Krivda, ____ U.S. _____, 93 S Ct. _____, 34 L. Ed.2d 45 (1972), this Court recently held that a decision of the Supreme Court of California would be vacated and the case remanded to that Court for further proceedings when this Court was unable to say with any degree of certainty the decision was not based on an adequate and independent nonfederal ground. However, the opinion in that decision fails to reflect the presence in that case of a more stringent and protective state constitutional provision such as Article I, Section 12, of the Florida Constitution,

and fails to reflect the presence of a more stringent and protective state statutory provision such as Section 933.18, Florida Statutes 1971. Because of said provisions dismissal or denial is more appropriate to this cause than such remand.

Respondent therefore respectfully submits that the Petition for a Writ of Certiorari to the Supreme Court of Florida fails to demonstrate that said decision was based upon and decided a federal question of substance, and said petition should be denied.

POINT TWO

THE PETITION FOR A WRIT OF CERTIORARI FAILS TO ESTABLISH THAT THE SUPREME COURT OF FLORIDA HAS DECIDED ANY FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH PRIOR APPLICABLE DECISIONS OF THIS COURT.

Respondent will not herein reiterate all the shortcomings of the affidavit herein considered nor attempt to treat the merits of this cause at this time. However, as to the propriety of these proceedings and the entitlement of the petitioner to issuance of the writ requested, it is appropriate to point out that the decision of the Florida Supreme Court fails to conflict with any of the prior decisions of this Court relied upon by petitioner, Florida.

In U.S. v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed.2d 684 (1965), which is the primary case relied upon herein by Florida, the affidavit expressly stated, under oath, that the information set forth therein was based upon the observations of the affiant officer or upon reports made to affiant officer by other officers describing the results of said other informing officers observations and investigations. Upon said basis the affidavit was upheld.

In contrast to the foregoing, and as expressly held by the Supreme Court of Florida, the affidavit in the case sub judice demonstrated that affiant had no personal knowledge of

the alleged events described; made no showing of informant Sheridan's knowledge (whether personal or hearsay and if hearsay of good reason to believe it); made no declaration or showing that informant Sheridan was reciting information from any official record; and contained no allegation that affiant even knew informant Sheridan.

In light of the foregoing, it is clear that the decision of the Supreme Court of Florida does not conflict with the holding of this Court in U.S. v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed.2d 684 (1965).

It is further clear that where the affidavit in the case sub judice was based totally on hearsay - an informer's report - and where the affidavit failed to declare either that the informant had himself observed the facts asserted or, if hearsay, the origin of same and good reason for crediting it, there was no basis for determination of probable cause by an independent magistrate, and the holding of insufficiency conflicts with neither Spinelli v. U.S., 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637 (1969), nor Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964).

Similarly, the holding of insufficiency is in no manner inconsistent with the decision of this Court in United States v. Harris, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed.2d 723 (1971),

for the affidavit in that case recounted personal and recent observations by the informant showing that the information had been gained in a reliable manner.

Respondent respectfully submits the Supreme Court of Florida, in light of the patent insufficiencies of the affidavit, was entirely correct in its holding that:

> . . . Any conclusion of a crime to be drawn from the affidavit rests upon a hopeless pyramiding of inferences. Agent Bondurant may 'in his opinion' have had good reason for 'his' belief that a search warrant should be issued, but that is not the legal test to be applied where his conclusion is based on hearsay. The affidavit of 3 typewritten pages, containing numerous handwritten corrections, was obviously no sudden ebullition, and could have easily contained the factors we have commented on, if known and if true.
>
> Law is and should be profound, and our conclusion is not to be construed as an avalanche of vituperation. In this case only, and upon these given facts, the affidavit falls short of being sufficient.

Respondent further respectfully submits that said decision is more in accord with, than in conflict with, prior applicable decisions of this Court, and that the requested writ should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of Florida is without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA has been furnished by United States Mail to counsel for petitioner, Honorable Robert L. Shevin, Attorney General, and Honorable Enoch J. Whitney, Assistant Attorney General, The Capitol, Tallahassee, Florida, this ____ day of _____, 1973.

_____
ATTORNEY

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM _____
NO. 73-1

STATE OF FLORIDA,

Petitioner,

-vs-

KEITH IVAR ANDERSEN,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE AND FACTS

The statements of the case and facts contained in petitioner's Petition for Writ of Certiorari previously filed in the above-styled cause are made a part hereof by reference.

QUESTION PRESENTED

WHETHER THE AFFIDAVIT IN THIS CASE, BEING BASED UPON INFORMATION OBTAINED BY LAW ENFORCEMENT OFFICERS ENGAGED IN THE DETECTION AND ARREST OF CRIMINAL ACTIVITY, IS SUFFICIENT, UNDER UNITED STATES SUPREME COURT DECISIONS CONSTRUING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, TO ESTABLISH PROBABLE CAUSE TO AUTHORIZE ISSUING A SEARCH WARRANT?

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the Florida Supreme Court clearly decided a federal question in this case, inasmuch as the Court's opinion relied solely on federal constitutional principles, and never once referred to a state statute or the state constitution.

On page three of the Court's opinion, there will be found several United States Supreme Court cases and the federal principles announced therein governing affidavits for search warrants. In addition, two Florida cases are cited, State v. Smith, 233 So. 2d 396 (Fla. 1970), and Reed v. State, 267 So. 2d 70 (Fla. 1972), that unmistakably and exclusively employ federal consti-

tutional principles in passing upon the sufficiency of affidavits for search warrants.

After reviewing these federal constitutional standards, the Court's opinion states:

> "Applying the foregoing principles to the affidavit sub judice, its tensile strength is stretched beyond endurance ..."
> (Page 3, Appendix I, Petition for Writ of Cetiorari, emphasis supplied.)

It is clear, therefore, that state authorities, claimed by respondent to be the basis for the opinion of the Florida Supreme Court, were never relied upon by the Court in reaching its conclusion.

Accordingly, respondent has shown no basis for his assertion that the judgment below was based on an adequate and independent non-federal ground. See Steele v. Louisville and Nashville R. Co., 323 U. S. 192, 197, note 1, 89 L. Ed 173, 180, note 1, 65 S. Ct. 226; Indiana Ex Rel. Anderson v. Brand, 303 U. S. 95, 98, 82 L. Ed 685, 689, 690, 58 S. Ct. 443; and Poafpybitty v. Skelly Oil Co., 390 U. S. 365, 375, 376, 19 L. Ed 2d 1238, 1246, 88 S. Ct. 982. Accord: International Steel and Iron Co. v.

National Surety Co., 297 U. S. 657, 666, 80 L. Ed 961, 967, 56 S. Ct. 619, where the Court stated:

> "'The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not.'" (Citing Grayson v. Harris, 267 U. S. 352, 358, 69 L. Ed 652, 655, 45 S. Ct. 317, emphasis supplied.)

CONCLUSION

For the foregoing reasons, in addition to those previously set forth in the Petition for Writ of Certiorari, a Writ of Certiorari should issue to review the decision of the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Petitioner's Reply Brief have been furnished respondent's counsel, the Honorable Wilfred C. Varn and the Honorable Thomas M. Ervin, Jr., ERVIN VARN, JACOBS & ODOM, Post Office Box 1170, Tallahassee, Florida, via U.S. Mail, this _____ day of August, 1973.

ENOCH J. WHITNEY
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Attorney General

OF
COUNSEL FOR PETITIONER